Filed 8/14/12 In re C.K. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re C.K., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. B.K., Defendant and Appellant.	G046499 (Super. Ct. No. DP019642) O P I N I O N
In re B.K. on Habeas Corpus.	G046715

Appeal from an order of the Superior Court of Orange County, Gary G. Bischoff, Temporary Judge (Pursuant to Cal. Const., art. VI, § 21), and a petition for writ of habeas corpus. Judgment affirmed. Petition denied.

Lauren K. Johnson, under appointment by the Court of Appeal, for Defendant, Appellant, and Petitioner.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Aurelio Torre, Deputy County Counsel, for Plaintiff and Respondent.

* * *

B.K. (Father) appeals from the order terminating his parental rights to his son, C.K., and freeing him for adoption. (Welf. & Inst. Code, § 366.26.)[1] On appeal, Father contends the juvenile court erred by failing to apply the parental benefit exception to termination of parental rights. (§ 366.26, subd. (c)(1)(B)(i).) Father also has filed a petition for writ of habeas corpus asserting he was denied effective assistance of counsel. We find no merit to his contentions. Accordingly, we affirm the order and deny the writ petition.

FACTS & PROCEDURE

Detention

C.K. was eight months old when the Orange County Social Services Agency (SSA) took him into protective custody in April 2010. The petition alleged jurisdiction under section 300, subdivision (b) [failure to protect] due to chronic domestic violence between Mother and Father that included verbal and physical altercations in C.K.'s presence. In December 2009, Mother was arrested for corporal injury on a spouse after a violent incident with Father. Between January and April of 2010, the police were called out to the family's house 16 times for family disturbances, to keep the peace, or for welfare checks. Father had an extensive criminal history dating back to 1992 that included numerous arrests and convictions for domestic violence and making criminal threats against his former wife, burglary, grand theft, parole violations, and violating protective orders. He admitted he used methamphetamine in the past but denied current use. The parents signed a safety plan with SSA in January 2010 agreeing to not expose C.K. to domestic violence.

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[1] All further statutory references are to the Welfare and Institutions Code. C.K.'s mother (Mother) does not appeal from the order.

On March 5, 2010, Mother was again arrested for inflicting corporal injury on Father. They were fighting over money, in the presence of C.K. and Father's 11-year-old son, S.K. (C.K.'s half-sibling). Father involved S.K. in the altercation, telling him to take his wallet. While Father was trying to restrain Mother, she was biting him. The social worker left C.K. in Mother's care. An emergency protective order protecting Father was issued. Father did not follow through with the order, and let it expire, continuing to have contact with Mother and continuing to engage in domestic violence in C.K.'s presence.

In April 2010, the police were called twice regarding domestic violence between the parents. C.K. and S.K. were detained.[2] Both parents admitted they had a volatile "explosive" relationship. Father said they were "[o]il and [w]ater" and he was separating from Mother and moving in with his mother. Mother said Father was controlling. Father admitted he served 10 years in prison for domestic terrorism after he threatened to kill his ex-wife, S.K.'s mother. Each parent reported the other was a good parent to C.K.; Mother reported Father bathed and cared for C.K. without hesitation.

At the detention hearing of April 9, 2010, Father was represented by retained counsel. The juvenile court detained C.K. and ordered SSA to evaluate the maternal grandparents for placement. Father was given twice-weekly supervised visits with C.K. The court issued mutual restraining orders against both parents.

Jurisdiction/Disposition Reporting Period

In its May 10, 2010, report for the jurisdictional and dispositional hearing, SSA reported C.K. was placed with the maternal grandparents in mid-April and was doing well. Father reported he had previously completed a year-long anger management program but admitted he still had anger issues and a temper. Father said he and Mother had sporadic domestic violence incidents while they were dating, but after they married and C.K. was born, the domestic violence escalated to almost daily. The maternal grandfather (a retired

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[2] A petition was also filed as to S.K., who was released to his mother, and the disposition of his dependency proceeding is not an issue in this appeal.

police officer) told the social worker he had a private investigator follow the parents and they were violating the court's restraining orders by having contact with each other. The social worker admonished the maternal grandfather to focus on caring for C.K. and let SSA worry about the parents.

Father attended supervised twice weekly visits that went well. Father said it hurt him to only see C.K. twice a week, he believed the visits were good, and he and C.K. enjoyed the time together. Father observed that since being removed, C.K. who used to be a "'Daddy's boy'" had latched onto the maternal grandfather. Father and the maternal grandparents did not have an agreeable relationship. The maternal grandparents said they supported Father's visitation, but they reported Father had sent them threatening text messages and therefore it would be difficult for them to monitor the visits. The maternal grandfather said Mother was "'a different person'" when she was with Father, and Father had threatened to kill him. Father said the maternal grandfather just wanted to break him and Mother up.

At a hearing on May 10, 2010, the juvenile court relieved Father's retained counsel and appointed counsel to represent Father. SSA reported Father admitted he violated the restraining order by having contact with Mother. On May 25, the parents pled no contest to the petition. The juvenile court declared C.K. a dependent child and removed him from parental custody. The court approved a reunification service plan for both parents and a six-month review hearing was set for November 10, 2010.

Six-Month Review Hearing

In its August 23, 2010, progress review report, SSA reported C.K. remained placed with the maternal grandparents. Father began some services, including completing a three-class parent education program and 10 classes of a 22-week anger management program. Father was regularly attending his twice weekly supervised visits with C.K. The visits went well, and C.K. seemed to enjoy them. Father was also attending weekly two-hour supervised visits with S.K. But there were problems too. Father had numerous

positive drug tests for marijuana in April, May, June, and July, although he also had several negative tests during the same time. Father claimed he had a medical marijuana prescription. (Mother also tested positive for marijuana several times and also claimed to have a medical marijuana prescription.) The parents continued to have violent incidents. In June, Father showed up outside Mother's workplace. Mother claimed Father threatened her and one of her co-workers; Father claimed Mother lured him there with an "'I love you'" text message. A week later, both were arrested following a disturbance outside the apartment they had previously shared, and where Mother still resided.

On November 10, 2010, SSA reported C.K. remained placed with the maternal grandparents. Father had once-weekly, four-hour visits with C.K., supervised by the paternal grandmother and staff at Orangewood Children's Home Visitation Center and none reported any concerns. C.K. visited with his brother S.K. during these visits. The visits went well—Father was appropriate with C.K. and met the child's needs, and C.K. enjoyed the visits. The social worker felt the prognosis for reunification was good at the time as both Mother and Father were compliant with their case plans and visitation. At the six-month review hearing, the court ordered six additional months of reunification services for the parents.

12-Month Review Hearing

On February 16, 2011, SSA reported Mother had begun having overnight visitation with C.K., in addition to 12 hours weekly unmonitored visitation. In April, SSA reported Father was compliant with his case plan, and overnight visits were being authorized for him as well.

On May 5, 2011, SSA reported C.K. remained placed with the maternal grandparents. Mother and Father currently lived in separate apartments but apparently had reconciled and lived together in December 2010, and continued to have an "on and off again" relationship. The social worker warned them that given their extensive domestic violence history their attempts at reunifying as a couple would slow reunification with C.K.

Their therapist terminated their conjoint sessions for being unproductive, as the parents were focused on their own relationship problems, not reunification with C.K. Nonetheless, the therapist reported both parents had C.K.'s best interest in mind, and seemed aware of the importance of his safety and well-being.

Father continued to comply with his case plan. The social worker reported father's visits with C.K. were "'going great.'" Father said he and C.K. were "'really close.'" The court extended reunification services for another six months and set an 18-month review hearing for September 26, 2011.

18-Month Review Hearing

SSA reported that in mid-May 2011, Mother said she did not feel ready for a 60-day trial release because she was in the process of moving. Father had stopped his overnight visitation with C.K., saying he felt it was too much for C.K. to go to three different homes to sleep. C.K. continued to live with the maternal grandparents.

Father resumed his overnight visits with C.K. in July. The parents began a shared, but separate, 60-day trial release with C.K. on July 25, 2011. Initially, the parents seemed to be working together and communicating well during the trial release. They exchanged custody of C.K. at the police department, which went well, and they understood they could not be together during their visits with C.K.

On September 6, 2011, SSA removed C.K. from the parents and returned him to the care of the maternal grandparents because the parents were not following the visitation rules. The parents were told they must always exchange custody of C.K. in a public place, i.e., the police station, and not visit with him together, a rule that was imposed to ensure C.K.'s safety due to their extensive domestic violence history. But Father and Mother had reunited, and Mother was frequently at Father's apartment when he had C.K. there. They had at least three altercations that resulted in the police being called out. Father claimed he called the police when Mother was yelling at him from outside the apartment and would not leave. Mother claimed she went to the apartment because she believed

Father was not properly caring for C.K., and because Father asked her to come over to watch C.K. Father denied mother's claims but admitted to not following the visitation rules. The maternal grandmother reported that at least three times when Father was supposed to have visitation with C.K., he asked her to take the child. The social worker ended the trial release and placed C.K. back with the maternal grandparents.

In its report for the September 26, 2011, 18-month review hearing, SSA recommended termination of services and scheduling a permanency planning hearing. After the trial release was terminated, Father began having unmonitored visits with C.K. for two days per week for two hours and on Saturdays for four hours. The social worker described Father's and Mother's participation in the case plan as "moderate."

The parents' therapist reported that when the 60-day trial release began in July, the parents were at first cooperative. But things soon went awry and they quickly lapsed back into their patterns. Father was routinely verbally abusive toward Mother in front of C.K. and the therapist, sometimes storming out of sessions. He could not start looking at the role his own behavior played in the violent relationship. The therapist did not believe Father was able to control his violent outbursts in front of C.K., but she also thought taking C.K. away without further possibility of reunification seemed "particularly harsh." Father ceased participating in his case plan activities.

The social worker noted although the parents were individually fine as parents, they could not get past their domestic violence issues. They would routinely say they were split up, but get back together hiding their resumed relationship until problems resurfaced. Despite 18 months of services, they could not resolve how to parent C.K. without having their incessant domestic violence spilling out in front of him.

Father was present at the 18-month review hearing and was represented by court-appointed counsel. The juvenile court terminated reunification services. The parties stipulated to a visitation order that included 10 hours of unmonitored visits per week on the

condition they have no unauthorized contact with each other during the visits and were not under the influence of alcohol or drugs.

Permanency Planning Hearing

The permanency planning hearing was set for January 17, 2012. The notice of the hearing was served on Father at the address he had confirmed as his correct address. The notice specifically advised Father he "ha[s] the right to be present at the hearing, [and] to present evidence . . . ."

In its report for the permanency planning hearing, SSA recommended termination of parental rights. C.K. was placed with the maternal grandparents who wanted to adopt him. The social worker reported she had confirmed Father enrolled in New Beginnings Drug Treatment Program in October 2011, which included one individual counseling session per week, two group counseling sessions per week, and twice-monthly testing. The report contained the name and telephone number of a contact person at the program.

The parents again were violating SSA's visitation rules. The maternal grandparents discovered the parents had taken C.K. to a theme park together despite orders they were not to have joint contact with the child. Father missed a visit in December, informing the maternal grandparents at the last minute he had to travel for a job offer. The maternal grandparents told the social worker the parents were avoiding the social worker. In late December, Mother returned to the maternal grandparents' home "'absolutely intoxicated'." Mother told the maternal grandparents she and Father were seeing each other, using methamphetamine together, and they had used methamphetamine in front of C.K. The maternal grandparents reported C.K. was often agitated, aggressive, and upset after visits with Father. The social worker restricted the parents' visits to four hours monitored due to them violating the visitation order and use of methamphetamine. When she telephoned Father to advise him of the restrictions, he became very upset and hung up on her. Father later explained he did not have anyone to supervise the visits on short notice.

At the permanency planning hearing, Father was not present in the courtroom, but was represented by his court-appointed counsel, Michael Hughes. Father's counsel stated, "Michael Hughes on behalf of [F]ather, your honor. Father is not currently present. He was here earlier. He indicated that and instructed me to submit the matter to the court and he said he didn't plan on staying. I encouraged him to stay. That's why I'm not making a motion to continue this matter. His only request was for a good-bye visit." Father's attorney wrote "submit" under his initials on the proposed orders and findings. The court terminated parental rights and freed C.K. for adoption.

DISCUSSION

The Appeal: Parental Benefit Exception

Father contends the juvenile court erred by failing to apply the parental benefit exception to termination of parental rights. We find no error.

At a permanency planning hearing, the juvenile court determines a permanent plan of care for a dependent child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 50.) Adoption is the permanent plan preferred by the Legislature. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573 (*Autumn H.*).) An exception to the adoption preference occurs when termination of parental rights would be detrimental to the child because the parent has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) The parent bears the burden of proof on both these prongs: (1) that visitation was consistent and regular; and (2) that the child would benefit from continuing the relationship. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1253.)

As SSA points out, because Father did not raise the parental benefit exception below, his argument on appeal would ordinarily be waived. (*In re Rachel M.* (2003) 113 Cal.App.4th 1289, 1295.) But because the juvenile court specifically found the exception did not apply, and in view of Father's related claims of ineffective assistance of counsel, out of an abundance of caution, we address the claim on its merits.

SSA concedes Father satisfied the first prong of the parental benefit exception with regular and consistent visitation. Nonetheless, we cannot say the juvenile court erred by concluding the exception did not apply because the second prong was not met.

To overcome the benefits associated with a stable, adoptive family, the parent seeking to invoke the section 366.26, subdivision (c)(1)(B)(i), exception must prove that severing the relationship will cause not merely some harm but substantial harm to the child. (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853 (*Brittany C.*).) Similarly, "the exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348 (*Jasmine D.*).)

In *Autumn H., supra,* 27 Cal.App.4th at page 575, the court articulated a test for determining whether a child would benefit from continuing a relationship with the natural parent. To succeed under this test, the parent must establish "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." In evaluating this issue, the court must "balance[] the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid*.) "The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond[, including t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs . . . ." (*Id.* at pp. 575-576; see also *In re Angel B.* (2002) 97 Cal.App.4th 454, 467 (*Angel B.*).)

"[P]leasant and cordial . . . visits are, by themselves, insufficient to mandate a permanent plan other than adoption." (*In re Brian R.* (1991) 2 Cal.App.4th 904, 924.) "[F]requent and loving contact" may also be insufficient to establish the type of beneficial relationship "contemplated by the statute." (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418 (*Beatrice M.*).) "'Interaction between [a] natural parent and child will always confer some incidental benefit to the child[,]'" but the basis of a beneficial relationship is that the parents have "occupied a parental role." (*Id*. at p. 1419.) "'While friendships are important, a child needs at least one parent. Where a biological parent . . . is incapable of functioning in that role, the child should be given every opportunity to bond with an individual who will assume the role of a parent.'" (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

Whether we apply the abuse of discretion standard or the substantial evidence standard (see *Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351 ["practical differences between the two standards of review are not significant"]), the result on appeal is the same. Substantial evidence supports the juvenile court's implicit conclusion termination of parental rights would not cause the child detriment because Father has failed to demonstrate the benefit C.K. would receive from maintaining their relationship outweighs the benefits he will gain in a permanent home with an adoptive parent. (See *Autumn H.*, *supra*, 27 Cal.App.4th at p. 574 [parent bore burden of establishing termination of parental rights would greatly harm child]; accord *Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

Father contends the evidence demonstrates C.K. would benefit from continued contact with him given they had frequent visitation during which he appropriately cared for C.K. and which by all reports went well. Furthermore, he argues C.K. appeared to enjoy the visits and Father felt there was a strong bond between them. But a successful parental benefit exception claim rests not on whether the parent/child contacts "'confer some incidental benefit to the child[,]'" but on whether the person "occupied a parental role" in the child's life. (*Beatrice M.*, *supra*, 29 Cal.App.4th at pp. 1418-1419.)

In re Jerome D. (2000) 84 Cal.App.4th 1200 (*Jerome D.*), and *In re Amber M.* (2002) 103 Cal.App.4th 681 (*Amber M.*), illustrate the compelling evidence necessary to establish the benefit exception. In *Jerome D.*, the child "seemed lonely, sad, and . . . 'the odd child out'" in his placement. He wanted to live with his mother and had enjoyed unsupervised night visits in her home. (*Id.* at pp. 1206-1207.) A psychologist opined the child and his mother "shared a 'strong and well[-]developed' parent-child relationship and a 'close attachment' approaching a primary bond." (*Id.* at p. 1207.) The court concluded keeping parental rights intact would prevent the child's "position as the odd child out in [placement] from becoming entrenched by a cessation of visits and the loss of his mother while [his half-siblings] continued to enjoy visits and remained [the mother's] children." (*Id*. at p. 1208.)

In *Amber M.*, *supra,* 103 Cal.App.4th at page 690, the court reversed termination of parental rights where a psychologist, therapists, and the court-appointed special advocate uniformly concluded "a beneficial parental relationship . . . clearly outweigh[ed] the benefit of adoption." Additionally, two older children had a "strong primary bond" with their mother, and the younger child was "very strongly attached to her." (*Ibid*.) If the adoptions had proceeded, the children would have been adopted in separate groups. (*Id*. at pp. 690–691.)

Here, Father did not demonstrate harm would have ensued from termination of parental rights similar to that demonstrated in *Amber M.* or *Jerome D.* At the permanency stage, the bond the child shares with the parent and the harm that might arise from terminating parental rights must be balanced against what is to be gained in a permanent stable home, and "it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*Jasmine D., supra,* 78 Cal.App.4th at p. 1350.) The parental benefit exception will apply only where the parent has demonstrated the benefits to the child of continuing the parental relationship outweigh the benefits of permanence through adoption.

C.K. was eight months old when taken into protective custody due to the relentless domestic violence between Father and Mother. He was two-and-one-half years old when parental rights were terminated. C.K. has lived apart from Father and Mother for almost his entire life, residing with the maternal grandparents for most of the dependency period during which time they have been meeting his daily needs. Although Father received 18 months of reunification services, during which he had frequent and often unmonitored visits, he was unable to comply with many of SSA's directives designed to prevent C.K.'s continual exposure to the parents' domestic violence. The pattern was predictable. Father and Mother would claim to be separated, and visits would be conditioned on their not being together with C.K. during visits. They would then secretly reconcile and flaunt SSA's visitation rules, until fights broke out and police were again called. When Father and Mother were approved for a 60-day trial release, within the first month the police were called three times due to incidents at Father's apartment. The parents' therapist reported the parents were often more focused on their toxic relationship issues, than on effectively parenting C.K., and she did not believe Father was able to control his outbursts when around the child. Father points to nothing in the record indicating that any benefit C.K. might gain by continuing his relationship with Father was outweighed by "the well-being [C.K.] would gain in a permanent home with new, adoptive parents" (*Autumn H., supra,* 27 Cal.App.4th at p. 575), free from constant exposure to domestic violence. Accordingly, we conclude the juvenile court did not abuse its discretion by concluding the parental benefit exception did not apply.

Father's related contention the juvenile court should have ordered a permanent plan of guardianship or long-term foster care is misplaced. He asserts such a plan would provide C.K. with stability while still allowing him to maintain parental contact through visitation. As noted in *Beatrice M., supra,* 29 Cal.App.4th at page 1419, "The Legislature has decreed . . . guardianship is not in the best interests of children who cannot be returned to their parents. These children can be afforded the best possible opportunity to get on with

the task of growing up by placing them in the most permanent and secure alternative that can be afforded them. In decreeing adoption to be the preferred permanent plan, the Legislature recognized that, 'Although guardianship may be a more stable solution than foster care, it is not irrevocable and thus falls short of the secure and permanent placement intended by the Legislature.' [Citation.]"

The Habeas Petition: Ineffective Assistance of Counsel

Father has filed a separate habeas petition claiming ineffective assistance of counsel. We deny the petition.

Father's declaration submitted in support of his habeas petition sets forth the following facts. His court-appointed counsel did not advise Father he had the right to testify at the January 17, 2012, permanency planning hearing. On the morning of the hearing, Father's court-appointed counsel met with him and asked if he had used methamphetamine as the maternal grandparents had claimed. (Interestingly, Father's declaration does not provide the answer to counsel's question, i.e., Father does not declare that he *denied* the maternal grandparents' allegation.) Counsel told Father his parental rights were going to be terminated. Father was upset and did not agree with the decision, but believing it to be a fait accompli he left and did not return for the hearing. Father denied telling his court-appointed counsel to submit or ask for a goodbye visit. Had Father known he could have testified, he would have told the court C.K. "has an extremely strong bond to me and looks to me as his father[,]" and when C.K. was with Father, Father provided care for C.K. Father would have testified he had "a very disagreeable relationship with the maternal grandparents who have told me that I will never see [C.K.] again if they adopt him." Father also declared he participated in the New Beginning Fellowship Center's drug treatment program from "October of 2011 until December of 2011[,]" which included individual counseling and drug testing. Father gave his court-appointed counsel information about his participation in the program. Father also declared C.K. and his sibling S.K. visited regularly until the trial release ended in September 2011 but had not seen each other since then.

Father's appellate counsel also provided a declaration in support of the habeas petition. Appellate counsel stated she spoke with Father's court-appointed trial counsel, but he declined to provide a declaration. (County Counsel similarly declared trial counsel did not wish to file a declaration in response to Father's habeas petition.) Trial counsel told appellate counsel he was aware of Father's participation in the New Beginning Fellowship Center's program but said the telephone number Father gave him was not good. Appellate counsel called the same telephone number, and it was valid. Appellate counsel also attached a letter dated November 8, 2011, from New Beginning Fellowship Center, stating Father had enrolled on October 24, 2011, and as of the date of the letter was in compliance. Trial counsel told appellate counsel he did not investigate Father's participation in the program, or speak to Father's therapist. Trial counsel stated he did not pursue a section 388 petition "because he believed [F]ather was not doing well and had used methamphetamine . . . ." Trial counsel said he told Father his parental rights would be terminated because "that was what he always told his clients when [trial counsel] believed the [juvenile] court was going to follow [SSA's] recommendation to terminate parental rights." Trial counsel "indicated" he did not specifically advise Father he had the right to testify at the permanency planning hearing or to present evidence.

A parent represented in a dependency proceeding is entitled to competent counsel. (§ 317.5.) In general, a claim of ineffective assistance of counsel is cognizable on a petition for writ of habeas corpus. (*In re Darlice C.* (2003) 105 Cal.App.4th 459, 463.) To establish ineffective assistance of counsel, a parent must demonstrate both that counsel's representation fell below an objective standard of reasonableness and resulting prejudice. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1667-1668.) The question of a violation of the right to effective representation is reviewed under the harmless error test. (*Id.* at p. 1668.) It is up to the parent to demonstrate it is "'reasonably probable that a result more favorable to [him] would have been reached in the absence of the error.' [Citation.]" (*Id.* at p. 1668.) The court need not evaluate whether counsel's performance was deficient

before examining the issue of prejudice. (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1180.) A claim of ineffective assistance of counsel fails if the parent cannot show the result would have been more favorable but for his trial counsel's failings. (*Ibid.*)

In this case, there is no evidence Father suffered prejudice as a result of any allegedly ineffective assistance of counsel. Father first contends his court-appointed trial counsel was deficient because he did not pursue a section 388 petition based on Father's participation in the New Beginning Fellowship Center's drug treatment program. Father claimed he had participated in the program from October 2011 until December 2011; he offered documentary confirmation of his compliance with the program from October 24 until November 8, 2011.

Father has not shown a reasonable probability a section 388 petition would have been granted based on the foregoing. Section 388 permits modification of a prior order only if the petitioner shows a "change of circumstances" and that a change of the prior order is in the dependent child's best interests. Moreover, the parent must demonstrate the circumstances that brought the child into the dependency system have truly *changed*: "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citation.]" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) The juvenile court was aware of Father's participation in the program as it was discussed in SSA's reports. In any event, C.K. was brought into dependency due to the parents' incessant domestic violence, and after 18 months of services, the parents were unable to go any length of time without resuming the cycle of domestic violence that permeated their lives. Father has not demonstrated his brief participation in a drug treatment program rendered the circumstances *changed.* Indeed, we note that even while participating in the program, Father and Mother continued to violate SSA's strict visitation rules by jointly visiting C.K.

Father also claims his court-appointed counsel did not tell him he could testify and/or present evidence at the permanency planning hearing. Although SSA is unable to refute Father's assertion in this regard, we note the written notice of the hearing served on Father specifically advised him of his "right to be present at the hearing [and] to present evidence . . . ." Father argues that had he testified he would have told the court about the bond he and C.K. shared. But we have already rejected Father's contention the court should have applied the parental benefit exception to termination of parental rights. Assuming a bond exists between C.K. and Father, Father has made no showing the bond is such that severing the relationship will cause not merely some harm but *substantial* harm to C.K., who has lived out of Father's care since infancy and for the majority of his life. (*Brittany C., supra,* 76 Cal.App.4th at p. 853.)

Finally, Father contends in passing his trial counsel was deficient because he did not raise the issue of sibling visitation between C.K. and S.K. It is not clear what visitation Father is referring to. To the extent Father is referring to C.K.'s visitation with S.K. *before* the permanency planning hearing, we note the record makes references to sibling visits during the 18-month reunification period and Father declares the boys were visiting regularly before the 60-day trial release was suspended in September 2011. To the extent Father is referring to those pre-termination visits, then the sibling visit issue would pertain to the applicability of the sibling benefit exception. (§ 366.26, subd. (c)(1)(B)(v); see *In re Valerie A.* (2007) 152 Cal.App.4th 987, 999-1000 (*Valerie A.*) [parent has standing to raise sibling visitation issues when it affects the sibling exception to termination of parental rights].) But Father has not demonstrated any reasonable probability the exception would have been applied.[3] And to the extent Father is objecting to counsel's failure to

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[3] The sibling benefit exception requires showing: "There would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit

request post-termination sibling visitation (*Valerie A.*, *supra*, 152 Cal.App.4th at p. 1004 [juvenile court has discretion to make ongoing sibling visitation orders during the period between termination of parental rights and adoption]), Father has offered no basis for us to find such visitation was appropriate or feasible.

DISPOSITION

The order is affirmed. The petition for writ of habeas corpus is denied.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.

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of legal permanence through adoption." (§ 366.26, subd. (c)(1)(B)(v).) C.K. was an infant when taken into protective custody. There is nothing in the record concerning the amount of time he spent with 11-year-old S.K., or the nature of their relationship, other than that C.K. was excited when he saw his older brother.